senting opinion in *Eisner* v. *Macomber, supra,* so as to drag it in under the Sixteenth Amendment. It seems, rather, that the Supreme Court has, in a doubtful situation, redefined income, and has thus made a distinct advance in the legal interpretation of the term. If the law as it stands works unjustly, it is up to Congress to change it. G. D. C.

NEGLIGENCE OF DRIVER NOT IMPUTED TO GUEST.—With the decision of the Wisconsin court in *Reiter* v. *Grober, et al.,* (Wis., 1921), 181 N. W. 739, there fell the last stronghold of the doctrine which imputed the negligence of the driver of a vehicle to a guest riding with him. The first American state to adopt the doctrine first enunciated in *Thorogood* v. *Bryan,* 8 C. B. 115, was the last to throw it overboard.

To impute the negligence of one person to another the relation between them must be one invoking the principles of agency, or the parties must be co-operating in a common or joint enterprise, or the relation between the parties must have been such that the person to whom the negligence is imputed must have had the legal right to control the action of the person actually negligent. I SHEARMAN & REDFIELD, LAW OF NEGLIGENCE, [6th Ed.], Sec. 65a, et seq.

In *Thorogood* v. *Bryan* (*supra*), an English court first held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of the driver which contributed to an injury inflicted upon such passenger by the negligence of a third party. This was but an attempted extended application of the old Roman doctrine of identification, and has been practically unanimously refused and denied in the United States. *Little* v. *Hackett,* 116 U. S. 366, 29 L. Ed. 652. In England, too, it was early recognized that the *Thorogood* decision rested "upon reasons inconclusive and unsatisfactory" and the case was over-ruled in *The Bernina,* 12 Prob. Div. 58, 13 App. Cas. 1.

While the doctrine was thus met with opposition upon all sides when applied to public conveyances, a remnant of it remained, when the Wisconsin court in *Houfe* v. *Fulton,* 29 Wis. 296, 9 Am. Rep. 568, and in *Priedeaux* v. *Mineral Point,* 43 Wis. 513, 28 Am. Rep. 558, adopted it in the case of passengers riding in *private* vehicles. This new theory, attacked when first enunciated and since as "resting upon no sound legal basis either as to agency or identity", *Reiter* v. *Grober* (*supra*), was repudiated by most courts, yet followed for a time in Montana and Nebraska. *Whittaker* v. *Helena,* 14 Mont. 124, 35 Pac. 904; *Omaha, etc., R. Co.* v. *Talbot,* 48 Neb. 627, 67 N. W. 569. But Montana repudiated the doctrine in 1908 in *Sherris* v. *Northern Pac. R. Co.,* 55 Mont. 189, 175 Pac. 269, and Nebraska dropped even earlier in *Loso* v. *Lancaster County,* 77 Neb. 466, where the court pointed out that the doctrine of imputed negligence cannot be logically applied unless there is some privity between driver and guest. Wisconsin stood by the principle for which it had become sponsor for more than fifty years, following the

Priedeaux case steadily either by a reaffirmance thereof or under the rule of stare decisis. See numerous cases cited in *Reiter* v. *Grober, (supra)*.

In support of the imputed negligence doctrine it was argued that he who voluntarily enters the private conveyance of another voluntarily trusts his personal safety in the conveyance to the person in control of it. The voluntary acceptance of transportation or carriage, it was reasoned, caused an adoption of the conveyance as one's own for the time being, and an assumption of the risk of the skill and care of the person guiding it. To sanction this line of argument in the case where the driver is not controlled by or is in any sense the agent of the guest is "unauthorized by law and repugnant to reason." *Union P. R. Co.* v. *Lapsley,* 51 Fed. 174. When a driver invites a stranger to ride with him, and the stranger accepts, upon what basis can it be said that there has by this transaction been established a relation of master and servant, or of principal and agent? Unless the guest is given control of the machine no such relation is created. *Dale* v. *Denver City Tramway Co.,* 173 Fed. 787. As one court puts it, "to create the imputation of negligence, the passenger or guest must have assumed such control and direction of the vehicle as to be considered in superior possession of it." *Duvall* v. *Atlantic Coast Line R. Co.,* 134 N. C. 331, 46 S. E. 750. It has even been held that merely making suggestions to the driver as to the route to be taken, or warning the driver of the conveyance of some danger does not amount to sufficient authority or control. *Zimmerman* v. *Union R. Co.,* 28 N. Y. App. Div. 445, 51 N. Y. S. 1; *Bergold* v. *Nassau Electric R. Co.,* 30 N. Y. App. Div. 438, 52 N. Y. S. 11. By the trend of authority it is also true that the doctrine of imputed negligence will not be applied although driver and guest are fellow-servants, *St. Louis, etc., R. Co.* v. *McFall,* 75 Ark. 30, 86 S. W. 824, or are relatives by blood or marriage. *Southern R. Co.* v. *King,* 128 Ga. 383, 57 S. E. 687; *Lake Shore, etc. R. Co.* v. *McIntosh,* 140 Ind. 261, 38 N. E. 476. *Contra*: *Vinton* v. *Plainfield Tp.,* 208 Mich. 179, 175 N. W. 403, (father and son).

It is interesting to note that a statute imputing the negligence of the operator of a motor vehicle to his guest, where the guest had no control over the operator, was held unconstitutional, as repugnant to the State and Federal Constitutions, because discriminative against persons riding in motor vehicles, and denying the equal protection of the law to persons similarly situated. *Birmingham-Tuscaloosa Ry. & U. Co.* v. *Carpenter,* 194 Ala. 141, 69 So. 626.

There are cases, though, where the guest is held guilty of negligence independently of imputation. Cases involving situations in which driver and guest are engaged in a joint undertaking or where the guest is lacking in ordinary care either in his choice of driver or in his conduct while being driven are often treated as exceptions to the rule against imputing negligence of a driver to his guest. In truth they are hardly exceptions, but really instances of independent acts of contributory negligence on the part of the guest which preclude a recovery on his part for injuries inflicted upon because of the negligence of the driver.

Thus it has been held in one case which says that the negligence of the driver is imputed to the guest where both are engaged in a joint enterprise, in which the transportation is a factor, that to establish a joint adventure "the passenger must have either express or implied right to direct the movement of the vehicle used." *Robison* v. *Oregon-Washington R. & Nav. Co.*, 90 Ore. 490, 176 Pac. 594.

The repudiation of the doctrine of imputed negligence, it must be understood, does not excuse the passenger or guest from exercising any care. If he does not exercise such care as a reasonably prudent man would exercise under the circumstances he cannot recover for injuries occasioned thereby. *Brommer* v. *Pa. R. Co.*, 179 Fed. 577, 103 C. C. A. 135. For a discussion of the meaning of "due care" see 19 MICH. L. REV. 433. In the principal Wisconsin case the guest was being sued, and the court finding him guilty of no active contributory negligence, absolved him from blame, even though he happened in this case to be a part owner of the machine driven by the negligent driver. In the earlier Wisconsin cases the court had imputed the driver's negligence to the guest on the theory of agency; and if such agency view was really sound, the conclusion would be almost inevitable in the principal case that the guest was liable. When the agency theory was thus really put to the test, the court had to upset some of its earlier doctrine. Most generally cases involving the contributory negligence of the guest are those in which a guest sues a third person whose negligence, the guest alleges, caused the injuries sued upon, and the third party interposes the contributory negligence of driver and guest.

A guest has been precluded from recovery where the negligent driver operated the vehicle at excessive speed at the suggestion and direction of the guest who wanted to arrive at a depot in time to meet a train, *Langley* v. *Southern Ry. Co.*, 113 S. C. 45, 101 S. E. 286; where the guest continued to ride with full knowledge of the fact that there were no lights on a car which was being driven on unfamiliar roads, *Rebillard* v. *Railroad Co.*, 216 Fed. 503; and where the guest remained in the machine with full knowledge of the fact that the driver was so intoxicated as to be unable to operate the machine properly. *Lynn* v. *Goodwin*, (Cal., 1915), 148 Pac. 927.

All these are really examples of independent negligence on the part of the guest. The old doctrine of imputed negligence must now be regarded as thoroughly exploded. H. A. A.

THE NEWBERRY CASE.—Senator Newberry of Michigan and sixteen others were convicted in the United States District Court on the charge that they "unlawfully and feloniously did conspire, combine, confederate, and agree together to commit the offense [in the Newberry indictment] on his part of wilfully violating the act of Congress approved June 25, 1910, as amended, by giving, contributing, expending, and using and by causing to be given, contributed, expended and used in procuring his nomination and election at said primary and general elections, a greater sum than the laws of Michigan